Supreme Court, U.S.
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No. 99-1040

In The

Supreme Court of the United States

PORT OF PORTLAND,

Petitioner,

v.

DONALD RONNE and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT RONNE'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

Introduction

This case is entirely fact-bound. But the decisive fact of the case – whether Longshore compensation claimant Ronne suffered a "new injury" of any kind to his back after he compensably injured his knee – was decided against the Port of Portland ("the Port"). Administrative Law Judge Alexander Karst, the only permissible fact-finder in this case, said:

> "The back injury presented here is not a distinct injury, but a continuation of the October 1989 knee injury."
>
> (App. 39)

Thus, though the Port claims that the Ninth Circuit's decision violates the "compensable consequences" rule of workers' compensation law, the simple fact is that, in this case, factually, medically, and legally, *this* Longshore claimant suffered but *one* injury. That fact, found by Judge Karst, was affirmed by the Benefits Review Board as based upon substantial evidence. (App. 22). For review purposes, that ends the inquiry, and that ends the case. This Court does not enter the fact-finding field in Longshore cases, and it does not permit the courts of appeal to do so either. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 140-141 (*Rambo II*) (1997). Thus, the finding that Ronne suffered but a single injury places the burden here for Ronne's disability – in its entirety – squarely on the Port, under all applications of the rule of "compensable consequences".

There is nothing new or unusual about such an occurrence. Whether a claim is a continuation of a primary industrial injury, or whether an employee has suffered an "aggravation", or a "new injury", is a matter litigated with frequency, if not precision. But that is so because the issue in those cases is so entirely *fact bound*, as it is in this case. As the court in *Cyr v. Crescent Wharf and Warehouse Co.*, 211 F.2d 454, 456 at n.1 (CA 9, 1954), quoting from *Head Drilling Co. v. Industrial Accident Comm.*, 177 Cal. 194, 197, 170 P. 157, 158 (1918), stated:

> " 'Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause *is a question of fact* for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld.' " (Emphasis added).

In its reply brief to the Ninth Circuit, the Port contended that the ALJ's finding that Ronne suffered but one injury was not a "true" factual determination. That is not surprising, because if it is a "factual" determination, the Port loses under all applications of the rule of compensable consequences, or the rule deciding "aggravation vs. new injury" claims. But it *is* a factual determination. As stated by Professor Larson, *The Law of Workmen's Compensation*, Section 13.00, at 3-517 (1992):

> "The simplest application of this principle [rule of compensable consequences] is the rule that all the medical consequences and sequelae that flow from the primary injury are compensable . . . *The issue in all of these cases is exclusively*

> *the medical issue* of causal connection between the primary injury and the subsequent medical complications." (Emphasis added)[1]

And, of course, the medical issue was resolved – and as seen below, had to be resolved – in Ronne's favor. That the court below thought so is evident in its holding:

> "We hold that, where an employee's total disability naturally progresses *from a single accidental injury*, the employee should be compensated at the average weekly wage rate as of the time of the accident if he cannot return to his former employment after that time."
>
> (App. 2, emphasis added)

The rule that determines liability in this context is simple, though it can have factual complexities, and engender litigation. The rule is that the employer on the risk of an industrial injury remains on the risk for that industrial injury and its natural and unavoidable consequences. That is what the Longshore statute says, and that is what the law has always been. It matters not whether the "natural and unavoidable consequences" occur in the same employment, in new employment, or *not in an employment setting at all*. The result is the same – the employer on the risk at the time of the injury remains on the risk so long – but only so long – as the consequences suffered by the worker are the natural and unavoidable ones from the original injury. If they are, the

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[1] In the most recent edition of this treatise, the rule is stated a little different, but with the same result: In compensable consequence cases, " . . . the question is purely a medical one . . . " Larson's Workers' Compensation Laws, Vol. 1, Chapter 10, Section 10.03, p. 10-5 (Matthew Bender, 1999).

employer remains on the risk for the claim in its entirety. If they are *not*, either because the employee has suffered a *new* injury, or because the consequences are the result of an intervening cause, the employer is no longer on the risk *at all*.[2]

So, to avoid application of that universally applied rule (where it has lost, given up, or refuses to accept the fact that Ronne has suffered a single, indivisible injury), the Port manufactures a "legal" issue to catch the Court's eye. The Port contends the Ninth Circuit created a "new rule", one which allegedly violates this Court's decision in *Potomac Electric Power Company v. Director, OWCP,* 449 U.S. 268 (1980) (*"PEPCO"*), and grants "retirees" benefits not permitted by the Act. That is just not so.

The Port misreads the decision below. The Ninth Circuit decision does not wrongly blend scheduled and unscheduled injuries; it does not conflict with *PEPCO*. Ronne's claim is for permanent *total* disability under Section 8(a), a claim specifically exempted from *PEPCO's* rule, a claim which *factually* arose from a single, indivisible injury. Ronne's claim has nothing to do with *PEPCO*. It certainly has nothing to do with "retirement" benefits.

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[2] While it may be that in two-employer and two-injury circumstances it is factually easier for a primary employer to shift responsibility to a second employer, it still remains that if the disability results from the natural progression of the first injury, and would have occurred notwithstanding the second injury, the primary employer remains responsible. See, *Jones v. Director, OWCP,* 977 F.2d 1106 (CA 7, 1992).

But, to create the issue, the Port unfortunately distorts the factual record, particularly about the reasons Ronne left the workforce.[3]

1. Ronne's "retirement"

Contrary to the Port's insinuations, Ronne never "voluntarily retired"; he was forced from the workforce by his work-related disability. Up until the time of the injury to his right knee, Ronne was a fully-registered longshoreman and a casual walking boss (foreman). He was 59 years old, robust, and enjoying what was then his 35th year on the waterfront. There is not a shred of evidence that prior to his knee injury he intended to "retire". Indeed, there is record evidence that he intended to work until age 67 or 68, or perhaps even longer (Claimant's Exhibit 34, Report of Dr. Jon C. Vessely, Orthopaedic Surgeon).[4] Though the Port complains here about paying

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[3] The Port also attempts to create a "conflict" among the circuits by quoting selectively from some circuit court cases. (Pet., pp. 2-4). But there is no conflict. Because of the factual finding that Ronne suffered but one, indivisible injury, the result reached by the Ninth Circuit here would be no different no matter where the case was decided.

[4] Ronne drew Social Security *disability* benefits for a time. (Tr. 64-65). He began drawing his longshore pension in June, 1995, when the Port "cut him off" (Tr. 62). This was almost *three years after* his back symptoms arose, and well over a year *after* the ALJ found Ronne to be medically stationary from his third knee surgery (App. 41). Thus, the Port's statements that Ronne's back condition " . . . was *non-existent* (not merely 'undiscovered') at the time of his retirement . . . " (Pet., p. 18, italics in original), and that " . . . the total disability caused by the back injury – did not arise until following retirement" (Pet., p. 19) are wrong.

Ronne benefits on the basis of a 1988 average weekly wage of about $960, Ronne, who has a ninth-grade education, had an earning potential of $130,000 annually if he became a full-time foreman on the Portland waterfront.[5]

For Ronne to have obtained an award of permanent total disability (which the Port now agrees is proper), he was required to rebut the Port's evidence that there was suitable work available for him. Ronne did so by showing that he unsuccessfully sought employment from *thirty* potential employers – including employment of the kind the Port contended was available to him.[6] Again, the ALJ's *fact-finding* is critical to placing this case in its proper perspective:

> " . . . Mr. Ronne successfully demonstated that he was diligent in his pursuit of work, yet failed to secure it. He apparently applied to some 30 employers, including parking lots and security companies, none of which hired him."
>
> (App. 34).

That fact-finding has never been challenged. Thus, the Port's pretension that the decision below somehow

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[5] "Mr. BABCOCK (Counsel for the Port): I will stipulate that a person in the local, walking boss local, working full time as a walking boss can make $130,000" (Tr. 123).

[6] The tone of the Port's petition here suggests that Ronne's permanent and total disability award was always a foregone conclusion. That is not so. The Port vigorously contested that award, and contended that *if* Ronne was entitled to anything for his back condition, it was an unscheduled award of permanent *partial* disability under Section 8(c)(21), and that such an award should be "minimal". (Tr. 19).

rewards Ronne for sloth, and gains for him an undeserved benefit because he is now a "retiree", is quite wrong.[7]

2. Ronne suffered but one "injury", as found by the ALJ.

The Port makes much of the timing of the arrival of Ronne's back symptoms, but again distorts the record to make its point. At the time Ronne's back symptoms appeared in July, 1992, he was *already* drawing temporary total disability benefits at an uncontested rate, a rate which used his average weekly wage *as of the date of his knee injury* (Claimant's Exhibit 41, p. 162). Ronne was drawing those time loss benefits appropriately because he had just undergone a third surgery for his knee, and was not medically stationary. That third surgery – a tibial osteotomy – involved the crushing of the femur of the leg, and the permanent placement of the tibia into a valgus position, that is, turned outward from the midline of the body to an abnormal degree. (See Claimant's Ex. 34, pp. 95-96). All physicians reported or testified that there was a causal relationship between the knee injury,

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[7] The Director also mistakenly assumed Ronne was retired. Below, he relied on 20 C.F.R. Section 702.601(c), which defines "retirement" as meaning that "the claimant . . . has voluntarily withdrawn from the workforce and there is no realistic expectation that such person will return to the workforce." Under that regulation, according to the Director, Ronne "retired" in November, 1990. That, of course, is not supported by any record evidence, and it is contrary to the ALJ's findings that Ronne was "diligent" in his pursuit of work long after that date, but was unable to secure it. (App. 34).

the knee surgeries, and the back symptoms. Dr. Michael Mason, neurological surgeon, perhaps said it best:

> "It is my feeling that the patient's knee problem, for which surgeries have been carried out, has resulted in a "imbalance" of the lower extremities and pelvis. I think that his lumbar spine has responded in trying to compensate, and this in turn has resulted in changes of the intervertebral spaces. In this sense, I think that there is a direct relationship between the patient's knee pathology and the current lumbar problems."
>
> (Claimant's Supplemental Exhibit 49).

Thus, in far more than a "knee bone is connected to the back bone" context (Pet., p. 4), Ronne's back condition arose "naturally and unavoidably" from his compensable knee injury. There was no "second" injury here; Ronne's back gave out, not because of any independent trauma, but because he walked on a badly-damaged knee during a recuperation period for surgery on that knee.[8]

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[8] In its reply brief below, the Port contended that there was indeed a new injury in the form of the "triggering event" of walking. That contention is without merit. Even under the most liberal standards of the Act, the mere act of walking does not constitute an "injury"; it cannot even cause an "occupational disease", because it is not an activity or risk that is "peculiar" to any given employment. See, the Ninth Circuit's cogent discussion of the issue, and reasons for not adopting the Director's suggestion that Ronne's back condition should be characterized as an "occupational disease" under the Act. App. 10-15. See also, *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177 (CA 2, 1989) [synovitis after traumatic knee injuries not an occupational disease, as bending, squatting, climbing or stooping not "peculiar" to shipyard work]. But, even if walking *could* be the cause of a separate "injury", it was

That is what the ALJ found, and that finding is supported by substantial evidence. And, subsequent to the time that Ronne's back became symptomatic, Ronne sought and was rejected for work. (App. 34). So to say, as the Port does, that this case is about a "post-retirement back injury" (Id.) does disservice to the record below, and to the opinion of the Ninth Circuit.

3. The rule of "compensable consequences"

As noted earlier, so long as the consequences of the original injury flow naturally and unavoidably from it, the employer at injury remains on the risk. The words of the statute make that clear:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment *or as naturally or unavoidably results from such accidental injury . . .* "
>
> 33 U.S.C. 902(2), emphasis added

The Port, conceding as it does that Ronne suffered a "single industrial accident" (Pet., Question Presented), nonetheless claims that Ronne should be compensated as if he had *two* injuries: a scheduled, partial disability award for the knee, and a total disability award based upon the loss of earning capacity hypothetically remaining after Ronne's knee impairment is factored out.

The Port bases its argument on the ALJ's finding that between Ronne's second and third knee surgeries he had

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not so here, because the ALJ found that Ronne suffered but a single injury.

a hypothetical earning capacity of $170 per week. That finding, however, is superfluous to any issue in the case. Ronne's disability was either partial under the schedule (for his knee), thus making an analysis of his "earning capacity" under *PEPCO* irrelevant, or he was totally disabled, which means he had no earning capacity. The award of permanent total disability, unchallenged here, is the only relevant measure of Ronne's earning capacity.

It is the Port, not the Court below, mixing scheduled and unscheduled disability. If Ronne's scheduled permanent partial disability (found by the ALJ to be at 20%) conclusively established his lost earning capacity, then Ronne conclusively *retained* 80% of his earning capacity when his back condition became a "new injury" under the Port's analysis. As noted, the Port stipulated that full-time Portland walking bosses had an earning potential of $130,000 annually. Ronne doubts that the Port is willing to make payments under that scenario.

Moreover, the Port does not explain how Ronne – totally disabled (though temporarily) because of his third knee surgery in March, 1992, and properly drawing total disability compensation based upon his average weekly wage of $963, magically is converted to an "earning capacity" of $170 a week, simply because he incurs *more* physical problems (to his back) during the recuperation process for that surgery, and then reaches maximum medical improvement for both of those conditions in April, 1994. The Port does not explain what has changed, other than Ronne's status from "temporary" to "permanent". Temporary total disability benefits and permanent total disability benefits are *both* based upon the worker's "average weekly wages". 33 U.S.C. 908(a) and (b). If Ronne was entitled to draw temporary total disability

compensation in March, 1992 based on an average weekly wage of $963, he was entitled to draw *permanent* total disability benefits for that same injury at that same rate in April, 1994 and thereafter.

The true – though well-disguised – mission of the Port here is to apportion its liability for a single injury, because it happened to bring about two medical conditions at different times in the healing process. The mischief of such a rule is self-evident. Such a rule is unsupported by reason or case law. It is certainly not supported by the rule of "compensable consequences".

4. The result reached by the Ninth Circuit here is correct and would be the same no matter where the case was decided.

The Port selectively quotes from decisions of this Court and other circuit courts to show that "time of injury" for purposes of the Act may have different meanings in different contexts. The Port does so, of course, to advance its position that it should be liable for a smaller award to Ronne.[9] But the distinctions drawn by the Port make no difference here, because Ronne's claim would be decided the same way no matter which circuit decided it. That is so, of course, because Ronne's injury was found as

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[9] Actually, the Port is no longer responsible for Ronne's award, as it was granted second injury relief from the Special Fund under Section 908(f) by the ALJ. Thus, the Port's responsibility for payment to Ronne ended in April, 1996 (App. 41).

a fact to be a single, indivisible injury by the ALJ.[10] It was an injury that caused *immediate* disability in the statutory sense of causing Ronne impaired earning power. *Johnson v. Director, OWCP*, 911 F.2d 247 (CA 9, 1990). Ronne immediately knew he was physically disabled. *Stancil v. Massey*, 436 F.2d 274 (CA D.C., 1970). So it makes no difference in this case whether "time of injury" means the date of the traumatic accident, as this Court said it did in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952), and the Fifth Circuit said it did in *LeBlanc v. Cooper/T.Smith Stevedoring Co.*, 130 F.3d 157 (CA 5, 1997), or if Ronne's "last injurious exposure" were used to set the "time of injury", as this Court did for trauma-induced hearing loss cases in *Bath Iron Works Corporation v. Director, OWCP*, 506 U.S. 153, 165 (1993). In all cases, Ronne's average weekly wage would be the same, set by the date of his December, 1988 traumatic knee injury.[11]

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[10] Different than *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (CA D.C.) and *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419 (CA 9, 1995) in that in both of those cases, the claimant suffered two, separate injuries.

[11] Because Ronne's wages *increased* between the December, 1988 and October, 1989 knee injuries, and because Ronne had not been employed "substantially the whole of the year" prior to the October, 1989 injury, under Section 910, the ALJ computed Ronne's compensation rate as of the time of Ronne's initial knee injury. The ALJ did so at the Port's request ["The employer . . . suggests the claimant's average weekly wage prior to the first injury is more representative.", (App. 37-38)]. The Port was quite willing to determine the "time of injury" as claimant's first injury when doing so worked to its *advantage*.

REASONS WHY THE PETITION SHOULD BE DENIED

Ronne respectfully submits that all that he has said above should be sufficient to warrant denial of the petition. The case is fact-bound, and was decided correctly and wholly consistent with principles of workers' compensation law that are universally accepted. He will respond, however, to the Port's stated "Reasons for Granting the Petition".

1. **The decision below is not contrary to this Court's decision in *PEPCO*. *PEPCO* dealt only with the exclusivity of scheduled and unscheduled permanent *partial* disability claims under Section 908(c)(1)-(20) and 908(c)(21). Ronne's claim is for permanent total disability under Section 908(a). *PEPCO* specifically held that it did not affect claims for permanent total disability.**

In *PEPCO*, the claimant (Cross) suffered an injury to his knee. As a result, he had a demonstrable permanent loss of earning capacity in excess of 40%. Because the physical impairment of his leg was rated only between 5 to 20%, however, his compensation award was limited to two-thirds of his wages for a fraction of 288 weeks, the amount limited by the schedule in Section 908(c)(1)-(20). Cross sought benefits under Section 908(c)(21), which would have given him a larger amount, measured by two-thirds of the difference between his average weekly earnings before the injury and his present wage earning capacity, multiplied by the number of weeks his disability continued. 449 U.S. at 271-272. Cross contended that he was entitled to "elect" which method of computation of

benefits would more fairly compensate him for his "true" loss of earning capacity.

This Court, noting that the language of the Act " . . . plainly supports the view that the character of the disability determines the method of compensation." 449 U.S. at 273, held that Cross was limited to the benefits in the schedule. In doing so, the Court noted that the clear language of Section 908(c)(21) would not permit the election Cross attempted:

> "Section 8 identifies four different categories of disability and separately prescribes the method of compensation for each. [FN8] In the permanent partial disability category, Section 8(c) provides a compensation schedule which covers 20 different specific injuries. It then adds an additional subparagraph, Section 8(c)(21), that applies to any injury not included within the list of specific injuries. There is no language in that additional subparagraph indicating that it was intended to provide an alternative method of compensation for the cases described in the preceding subparagraphs; quite the contrary, by its terms, subparagraph (21) is applicable "In all other cases." [FN9]
>
> 449 U.S. at 273-4, footnotes omitted.

In deciding the issue, and limiting Cross to the schedule, however, the Court was clear in stating the limits of its decision:

> "We are concerned here solely with a case in which a scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability.
>
> 449 U.S. at 279 n.20.

* * *

> "Indeed, since the Section 8(c) schedule applies only in cases of permanent partial disability, *once it is determined that an employee is totally disabled the schedule becomes irrelevant.*"
>
> 449 U.S. at 277 n.17, emphasis added.

Unlike the claimant in *PEPCO*, whose injury was *partial*, and therefore was strictly limited to the schedule of benefits under Section 908(c)(1)-(20), Ronne, though he suffered injury to a scheduled member, and immediately suffered disability (reduced earning power), became permanently and totally disabled. He became so as a result of the natural and unavoidable consequences of his single, indivisible injury. That fact is no longer contestable. To the extent *PEPCO* is relevant at all, it supports the decision below, for it recognizes that now that Ronne is permanently and totally disabled, the schedule is "irrelevant".

2. The decision below compensates Ronne for a single injury. It does not create a benefit for "retired" workers. Ronne's back condition arose during recuperation from surgery for his knee injury. He was not "retired" at that time or anytime soon thereafter.

Ronne first must question whether this issue is properly before the Court. The Port's petition rests almost entirely on its theme that affirmance by the Ninth Circuit of the Benefits Review Board and the ALJ decisions in this case creates a "new" class of "retiree" benefits for longshore claimants. The result reached by the Ninth Circuit is the same as that reached by the Benefits Review

Board and the ALJ. The Port first mentioned the word "retiree" before the Ninth Circuit, however, in its reply brief, in a footnote on the last page. In responding to the Director's position that Ronne's benefits should be calculated under Section 10(i) [retired workers latent disease claims], the Port said: "Although Mr. Ronne's election to not accept the employment that he could have performed after the knee problems forced his departure from the waterfront could arguably place him within the 'retiree' category as the Director contends at page 21 of his brief, the Director's effort to expand traditional occupational disease concepts to include all 'derangements' and 'disordered states' is something which is both unnecessary to the proper resolution of this case, and, Petitioners suggest, better suited to the legislative or regulation promulgation process."

The Port does not explain here why Ronne's status, which was only "arguably" that of a "retiree" below, is now of such great importance as to invoke this Court's participation in this case. See, *Delta Airlines v. August*, 450 U.S. 346, at 362 (1981).

In any event, and as noted above, the record does not support the Port's assertion that Ronne retired prior to the beginning of his back symptoms. Ronne's tibial osteotomy, which directly caused the back condition to appear, occurred in March, 1992. Back symptoms began in July and August, 1992, and continued thereafter. It was *subsequent* to the onset of back symptoms that Ronne became discouraged at the level of his disability, and reported to a panel of vocational examiners in February, 1993 that although he did not want to be retired, he saw himself as "essentially" so because of his disabilities. Nonetheless,

Ronne did not apply for, nor receive, his longshore pension until mid-1995. And as noted, even then, he sought work, and the ALJ credited that effort. (App. 34).

Ronne was not retired; he proved his entitlement to permanent total disability. He is entitled to be compensated under the Act as of the date of his injury. For all purposes, in this case that date is October, 1989, and no other date.

Finally, the Port's parade of horrors should be dismissed out of hand. There is no cadre of retirement-community golfers waiting to fall down and enrich themselves at the expense of the Port. For every falling golfer, the Port should remember that there is a worker, 20% disabled under the schedule with an average weekly wage at time of injury of a few hundred dollars, who unlike Ronne, is fortunate now to be earning over $100,000 annually. When that worker's scheduled injury spreads to his or her back, and that worker's spreading disability is found as a fact to have "naturally and unavoidably" resulted from the scheduled injury, that worker will look quite favorably at the Port's proposed rule. And while there would be nothing unfair about that occurrence, it is not one found in the statute. This statute, as the Court has recognized so many times, is one of compromise, risk spreading, and limited benefits. The balance happened to fall in favor of the worker in this case, but that is a result dictated by the statute.

CONCLUSION

The petition should be denied. The case is entirely fact-bound, and was correctly decided by the Ninth Circuit. There is no conflict within the Circuit Courts regarding the issue raised in this case, nor is the case in conflict with any case decided by this Court.

DATED: February 18, 2000

Respectfully submitted,

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